



Citation: *MT v Canada Employment Insurance Commission*, 2023 SST 1452

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: M. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (517650) dated July 22, 2022 (issued by Service Canada)

Tribunal member: Susan Stapleton

Type of hearing: Teleconference

Hearing date: January 17, 2023

Hearing participant: Appellant

Decision date: January 20, 2023

File number: GE-22-2661

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job as a telecommunications installer. The employer says he was let go because he went against its vaccination policy: he didn't get vaccinated against Covid-19 (Covid).² He applied for EI benefits.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy is not misconduct. He has an autoimmune disorder. He believes that the Covid vaccine is experimental and ineffective, and that it could harm his health. He did testing and used proper PPE, such as gloves and a mask, when he worked throughout the pandemic. Having to be vaccinated wasn't part of his original employment contract. His employer's vaccination policy violates his rights. He feels he is being discriminated against for his choice to remain unvaccinated. He has paid into EI and feels that he is entitled to benefits.³

[5] The employer told the Commission that it had been talking about a mandatory vaccine policy since the summer of 2021, so there was plenty of opportunity for the Claimant to be vaccinated within the requirements of the policy. It said that its policy stated that employees could lose their jobs if they didn't get vaccinated.⁴

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

² GD3-33.

³ GD2-3.

⁴ GD3-49.

[6] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Issue

[7] Did the Claimant lose his job because of misconduct?

Analysis

[8] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.⁵

[9] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[10] I find that the Claimant lost his job because he went against his employer's vaccination policy. He testified that he was let go because there wasn't enough work for him because he was unvaccinated. He told the Commission that he lost his job because he refused to get the Covid vaccination.⁶

[11] The employer told the Commission that the Claimant was dismissed because he didn't get vaccinated. The employer said it had no work for the Claimant, because all of its clients had mandatory vaccination policies in place. The employer said that its vaccination policy clearly stated that employees could lose their jobs if they were not vaccinated.⁷

[12] The employer's policy said that all employees had to provide proof of being fully vaccinated by October 1, 2021. If an employee was not fully vaccinated by October 1,

⁵ See sections 30 and 31 of the Act.

⁶ GD3-38.

⁷ GD3-49.

2021, they could not enter Head Office or work on any customer site. The policy also said that if an unvaccinated employee must enter head office or work on a customer site, the employee would be required to provide a negative Covid test result and wear a mask. The policy said that unvaccinated employees may be unable to work on worksites that had a vaccine mandate. The policy said many of the employer's clients were requiring 100% vaccination to attend any work site or work with any of their equipment. The policy said that the employer would make an effort to place an unvaccinated employee on a job where vaccination wasn't required, but that if there was a shortage of work sites available for unvaccinated employees, unpaid leave or termination of employment may be necessary.⁸

[13] The Claimant testified that he first heard that his employer was going to have a Covid vaccination policy in the summer of 2021. On September 1, 2021, a policy was emailed to employees. It said that the employer wanted all employees to be vaccinated. It also said that unvaccinated employees could continue to work, but only at worksites that didn't have a vaccine mandate. Unvaccinated employees couldn't work at worksites that had vaccine mandates.

[14] The Claimant testified that he worked in a small office with two other people, a team leader and another installer. They discussed the employer's policy at the office. While the policy didn't say that employees had to be vaccinated by a certain date or they *would* lose their jobs, it said that employees *could* lose their jobs if they weren't vaccinated. He said the employer talked the same way the policy was written – "you *could* lose your job, you *may* lose your job, we *may* be forced to let you go." It didn't say in absolute language that he *would* lose his job if he didn't get vaccinated. He said that the policy also said that unvaccinated employees would have to pay the costs of testing.

[15] The Claimant said that after he received the policy, he emailed the employer about having to pay for testing because he wasn't vaccinated. The employer responded, outlining the policy requirements, but no longer saying that unvaccinated employees would have to pay for testing. The employer repeated in that response that

⁸ GD3-35.

unvaccinated employees could only work at worksites that didn't have vaccine mandates.

[16] The Claimant testified that the majority of his work was done in customers' homes. He wasn't aware of any provincial or federal mandate that prevented telecommunications workers, such as himself, from going into customers' homes if they weren't vaccinated.

[17] The Claimant said that the employer contracted for X. X put a policy in place requiring all employees to be vaccinated. The Claimant said he doesn't know when X's policy came into effect, but that it was after the employer's policy was put in place. He said that the employer had told him before he was dismissed, that X would be coming out with a mandatory vaccine policy, and that he wouldn't be able to work in customers' homes unless he was vaccinated. He said he was installing services in customers' homes for X right up until he was dismissed on November 22, 2021.

[18] The Claimant testified that he got a phone call from his manager a week before he was dismissed. The manager asked him if he would be willing to be vaccinated against Covid if the deadline to do so was extended. The Claimant told the manager that he had concerns about the vaccine itself, and because he had an underlying medical condition. The manager said "ok, if that's your decision, that's fine." He didn't expressly say that the Claimant would be let go if he didn't get the vaccine, but the Claimant testified that he "did get that feeling from the conversation." He testified that he knew there was a possibility he could lose his job if he didn't get vaccinated.

[19] The employer sent the Claimant a letter on November 22, 2021. It said: "Your position is being terminated as per our previous conversations. Due to requirements from our clients, and our current vaccination policy, we do not have work to provide you with employment."

[20] The employer's policy stated that it would consider individual exemption requests on the basis of medical grounds and/or because of creed/religion. It said the employer may accommodate those employees through measures other than being granted

access to offices/worksites, provided no undue hardship on the operations of the Company would occur.⁹

[21] The Claimant testified that he didn't request a medical exemption from being vaccinated. When he told the employer about his medical condition and his concerns about how the vaccine might affect his health, the employer didn't ask him to get a medical note. He said the employer's vaccination policy said employees had to have a government-approved exemption. He didn't know what that meant, and he didn't ask the employer about it.

[22] The Claimant testified that he offered to work at reduced hours, or performing different duties because he wasn't vaccinated. But his employer denied this request, because it didn't have such work available for him.

[23] The Commission says that the Claimant made a personal choice not to be vaccinated. It argues he knew that not following the employer's vaccination policy would result in him losing his job.

Is the reason for the Claimant's dismissal misconduct under the law?

[24] The reason for the Claimant's dismissal is misconduct under the law.

[25] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[26] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁰ Misconduct also includes conduct that is so reckless that it is almost wilful.¹¹ The Claimant doesn't have to have

⁹ GD3-35.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.¹²

[27] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.¹³

[28] The Commission has to prove that the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.¹⁴

[29] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it isn't for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him.¹⁵ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[30] In a Federal Court of Appeal (FCA) case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.¹⁶ He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[31] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.¹⁷

¹² See *Attorney General of Canada v Secours*, A-352-94.

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁶ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

[32] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.¹⁸

[33] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.¹⁹ He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.²⁰

[34] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.²¹ He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.²²

[35] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to let the Claimant go. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

[36] The Commission says that there was misconduct because:

- the employer had a vaccination policy;

¹⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

¹⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

²⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

²¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- the employer clearly notified the Claimant about its expectations about getting vaccinated;
- the Claimant chose not to get vaccinated and was therefore dismissed from his job; and
- the Claimant knew or should have known what would happen if he didn't follow the policy.

[37] The Claimant says that there was no misconduct because:

- the employer's policy said that unvaccinated employees could still work, at worksites that didn't have vaccine mandates;
- most of his work was done at customers' homes, and there was no provincial or federal government directive that said unvaccinated telecommunications employees couldn't enter customers' homes to work;
- he told the employer that he has an autoimmune condition and is concerned that the vaccine could harm his health;
- the employer didn't ask him for medical documentation regarding his autoimmune condition;
- the vaccine is experimental and ineffective;
- vaccination was not a requirement of his employment contract; and
- the employer's policy violated his rights and discriminated against him because he chose not to be vaccinated.

[38] The employer's vaccination policy said that all employees must be vaccinated to enter Head Office or customer worksites. The policy also said that unvaccinated employees could work at worksites that didn't have a vaccine mandate, provided they take other safety measures, such as testing and wearing a mask.

[39] The employer contracted for X and told the Claimant that X was going to require that employees be vaccinated to enter customers' homes. Therefore, the Claimant would have to be vaccinated for the employer to have work available to him, because the employer had to comply with X's vaccination requirements. The employer's policy said that if work was not available for an unvaccinated employee, the employee could lose their job.

[40] Although the Claimant testified that he worked in customers' homes right up until his dismissal, he also said that the employer had made it clear to him that X was going to require that employees be vaccinated. This requirement meant that he would no longer be allowed to enter customer's homes to work. The employer asked him again, a week before his dismissal, if he was willing to be vaccinated, and he declined. He testified that he got the feeling from that conversation with the employer that if he didn't get vaccinated, he was going to lose his job. He said he knew it was a possibility.

[41] I find that the Claimant knew, or should have known, what he had to do under the employer's vaccination policy and what would happen if he didn't follow it. The employer's policy stated that if there wasn't enough work available for an unvaccinated employee, the employee could lose their job. The employer wrote to the Claimant, repeating its vaccine policy requirements. The Claimant confirmed that he knew if he didn't follow the policy requirements, he could lose his job. Although the Claimant testified that the employer only said that he *could* lose his job if he wasn't vaccinated and not enough work was available for him, I find that he knew or should have known that there was a real possibility that he would be let go from his job if he didn't get vaccinated.

[42] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that said employees had to be vaccinated to enter its premises and customer worksites;

- the employer's policy said that if there wasn't enough work available at worksites that didn't have a vaccine mandate, an unvaccinated employee could be dismissed from their job;
- the employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated;
- the employer wrote and spoke to the Claimant to communicate what it expected;
- the Claimant didn't get vaccinated and was dismissed from his job; and
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy.

So, did the Claimant lose his job because of misconduct?

[43] Based on my findings above, I find that the Claimant lost his job because of misconduct.

[44] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to lose his job.

[45] The Claimant feels that he has a right to receive EI benefits. I understand that he feels he should get EI because he's paid into it. However, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. He has not met the requirements to be eligible for benefits.

Conclusion

[46] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[47] This means that the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section